United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

74-1762

United States Court of Appeals
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

against

S. H. KRESS AND COMPANY,
Respondent.

APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

RESPONDENT'S BRIEF AND APPENDIX

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Questions Presented

1. Did the Board abuse its discretion in refusing to dismiss the representation petition because of the supervisors' assistance to the Union, when under similar circumstances, the Board has consistently dismissed representation petitions in other cases?

2. In an election in which 28 ballots were cast for and 25 against the Union was the Board's action overruling the election objections supported by substantial evidence in the record as a whole?

3. Did the Board err and deprive the Company of due process in refusing to hold a hearing on 6 of the Company's 8 objections where there were material and substantial factual questions affecting the validity of the election?

4. Did the Board deny the Company a fair hearing on objections 5 and 7 and on the challenged ballots by (a) permitting counsel for the Region to participate in the hearing as an adverse party and (b) refusing to permit the Company to adduce evidence on critical issues, and (c) refusing to permit the Company to submit a brief to the Hearing Officer and thereafter discrediting the testimony of the Company's witnesses?

Counterstatement of the Case

The Board's statement of the case requires amplification and correction.

On March 10, 1972, at the representation hearing the parties stipulated to the appropriate unit which specifically

excluded all display department employees (A 199). The parties also stipulated that Josie Guzman and Haydee Feliciano, among others, were supervisors within the meaning of the Act (A 5, fn. 5, 202). When it entered into the stipulation at the March 10 hearing, the Union was accompanied by five employees from the store, members of the Union organizing committee, who were there to assist the Union in determining who was eligible to vote (A 372, 380).[1] On March 27, 1972, the Regional Director approved the unit stipulated by the parties (A 4-7).

On April 4, 1972, the Company submitted to the Regional Director evidence, which had recently come to its attention, that the Union's showing of interest in support of the representation petition was tainted by the activities of the two Company supervisors, Josie Guzman and Haydee Feliciano. The Company, therefore, requested, that the Regional Director conduct an administrative investigation pursuant to the procedure described in reported Board decisions, and if supervisory participation in the Union's organizational activities was found, the Regional Director should dismiss the representation petition.[2] Although the evidence of supervisory participation was submitted more than 30 days before the election was held and prior to the date the election was even scheduled, the Regional Director summarily refused to consider the evidence or to conduct an adminis-

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[1] The five store employees present at the representation hearing on March 10, 1972, included Josie Guzman, Carmen Valentin, Sonia Morales, Grace Phillips and Victor Diaz (A 372, 385).

[2] Although the Company's request for an administrative investigation and dismissal of the representation proceeding was part of the representation case, and the Regional Director's failure to make such investigation was also raised as one of the Company's election objections, the Board's General Counsel refused to include the material relating to this issue in the certified list or in the joint appendix to this Court. To get this material before the Court, the Company has included it as an appendix to Respondent's Brief. Reference to appendix to Respondent's Brief will be preceded by the letters "RA."

trative investigation, and, instead, proceeded to make election arrangements. The sole ground for the Regional Director's action was that the Company did not raise this issue within five days after the close of the hearing (RA 2).

At the election which was conducted on May 5, 1972, between the hours of 2:30 and 5:00 p.m., 25 votes were cast for the Union and 23 against, with six ballots challenged. On May 11, 1972, the Company filed timely objections to the conduct of the election and conduct affecting the results of the election, including eight specific bases for its objections and emphasizing that individually and collectively this conduct interfered with the election (A 84-886).

In support of its objections the Company submitted statements, affidavits and documentary evidence which demonstrated that in its pre-election campaign the Union made last minute misrepresentations concerning the Union dues and initiation fees, and, additionally, misrepresented benefits provided in Union contracts; that the Union's vice-president, Abreu, electioneered in the proscribed area while employees were voting; that the Union vice-president escorted into the Company premises, U. S. Congressman Herman Badillo and Irma Santaella, a Commissioner of the New York State Human Rights Commission, who electioneered among employees while they were at work making it appear that the government favored the Union and made false statements designed to make it appear that the Company discriminated against its Puerto Rican employees.

In addition, the Company submitted evidence which showed that supervisors initiated and sponsored the Union, encouraged and obtained Union authorization cards, attended Union meetings, and acted as members of the Union organizing committee.

On July 28, 1972, without a hearing, the Regional Director disposed of all of the Company's objections in a supplemental decision which ignores many relevant facts,

misconstrues other facts, unilaterally determines disputed issues of fact and fails to articulate the basis for many of the findings and conclusions (A. 8-30).

In disposing of the challenges the Regional Director overruled the Company's objections to the votes of display department employees, even though display department employees were specifically excluded from the voting unit by stipulation of the parties, and overruled the Company's objections to Carmen Valentin's ballot because she claimed she was on vacation while the Company claimed she had quit.

The Company thereafter filed with the Board a timely request for review of the supplemental decision (A. 87 *et seq.*). By telegram dated October 16, 1972, the Board remanded the case to the Regional Director to hold a hearing on Objection 5, dealing with the Union's electioneering during voting hours, and Objection 7 on the supervisors' actions in support of the Union, and as to 4 challenged ballots.[3] The Board denied the Company's request for review and hearing on all other objections (A. 33).

On October 20, 1972, the Company requested the Board to reconsider its order and to direct a hearing on all objections. The Company also requested, in view of the bias and prejudice displayed in the Regional Director's supplementary decision and during the investigation of the objections and challenges, that such hearing be before an impartial trial examiner rather than a representative of the Region (A. 149, 150).[4] By telegram dated October 27, 1972, the

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[3] The Company does not except to the disposition of the fourth challenged ballot. Only the disposition of the challenges to Maria Aviles, Sonia Morales and Carmen Valentin's ballots is in issue.

[4] A hearing officer is a Board employee under the general overall authority of the Board's General Counsel. See CCH Lab. Law

(footnote continued on following page)

Board summarily denied the Company's request for reconsideration (A 151).

At the limited hearing on two of the 8 objections and on 4 challenges held pursuant to the Board's remand, the Hearing Officer permitted the representative of the Region to participate and question witnesses as an adversary (A. 322, 434), to make prejudicial statements without testifying under oath (A. 737), to call a Board agent as a witness while refusing to permit the Company to do so (A. 535-536), rejected the Company's request to have its own Spanish interpreter in the hearing room when a Spanish speaking witness testified (A. 331), permitted Union's counsel to examine contents of affidavits from the Region's file which were not involved in the witness' direct testimony (A. 278). He also permitted Union's counsel to lead his own witnesses but improperly limited Company counsel's examination of witnesses (A. 274, 451-455, 475-476, 504-506, 633). At the request of Union counsel the Hearing Officer admitted into evidence the totality of the Company's campaign in assessing the effect of the Union's objectionable conduct but refused to admit evidence of or to consider the cumulative effect of the Union's objectionable conduct in ruling on the Company's objections (A. 558-562). Further, even though the evidence adduced at the hearing covered a broad range of both legal and evidentiary issues, the Hearing Officer refused to permit the Company to file a brief, which it considered essential to bring to the Hearing Officer's attention salient evidence, to explicate the delicate and essential credibility determinations, and to clarify the issues involved.

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Rep. Sec. 1120.0 at 3053. He is not to be confused with a "trial examiner" (now called administrative law judge), who is an independent "hearing examiner" within the meaning of the Administrative Procedure Act. (5 U.S.C. Sec. 556, 5 U.S.C. Sec. 3105.

On December 27, 1972, the Company filed a special appeal to the Board from the Hearing Officer's denial of its request to file a brief at the close of the hearing. This was denied by telegram dated January 11, 1973 (A. 182-184, 185). The Hearing Officer, thereafter, issued his report and recommendation in which he recommended that the Company's objections be overruled, that the 4 challenges be overruled, and that these ballots be opened and counted (A. 44-47). The Company filed timely exceptions to the Hearing Officer's report (Certified Record 1-17). By order dated June 28, 1973, the Board adopted the Hearing Officer's report *pro forma* (A. 67-69).

Following the Union's certification the Company declined to honor the Union's bargaining request on the ground that it deemed the certification improper and that such declination was the only basis upon which a judicial review of the validity of the certification could be obtained.[5]

ARGUMENT

I. The Standard of Review

The Board's contention that the sole issue raised herein is whether it "acted within the 'wide degree of discretion' . . . entrusted to it" (Board brief, p. 6) which would restrict this Court's review of the Company's election objections in this case is not warranted by the law.

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[5] The Board's brief (p. 5) states that the Board found that the Company violated Sec. 8(a)(5) and (1) of the Act. The only Sec. 8(a)(1) violation which the Board found derived solely from the 8(a)(5) refusal to bargain charge. There was no finding that the Company engaged in any other unfair labor practice. "Moreover, no opprobrium attaches to an employer's refusal to bargain where, as here, the refusal is based upon the employer's desire to test the Board's . . . findings in an underlying representation proceeding." *Metropolitan Life Ins. Co.*, 156 NLRB 1408, 1410.

While the decisions of the Board in framing rules regarding the determination of the appropriate unit for bargaining and the mechanics of the election are entitled to a certain deference, this does not mean that the evidentiary findings of the Board may not be reviewed under the substantial evidence standard and that a court of appeals may not draw conclusions from the factual determinations on review.[6]

The Supreme Court in *Boire* v. *Greyhound Corporation,* 376 U.S. 473, 478, fn. 5, quoted from the House Report which described the standard for review to be used by courts of appeals in such cases:

> "Section 9(d) of the Bill provides an exclusive, complete and adequate remedy whenever an order of the Board made pursuant to Section 10(c) is based in whole or in part upon facts certified following an election or other investigation pursuant to Section 9(c). * * *
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> * * * *
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> Since the certification and the record of the investigation are required to be included in the transcript of the entire record filed pursuant to Section 10(e) or (f), the *Board's actions and determinations of fact and law in regard thereto will be subject to the same court review as is provided for its other determinations under Section 10(b) and 10(c).* H.R.Rep. No. 972, 74th Cong. 1st Sess. 20." (Emphasis supplied)

The standard of review is that the findings of the Board shall be conclusive only if supported by substantial evidence on the record considered as a whole. 29 U.S.C. Sec. 160(e); *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 487; *NLRB* v. *Metropolitan Life Ins. Co.,* 405 F.2d 1169, 1173 (C.A.2); *NLRB* v. *Trancoa Chemical Corporation,* 303 F.2d 456, 461

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[6] The cases cited by the Board in support of its position deal with procedural irregularities in the mechanics of the election or unit determinations.

(C.A.1); *NLRB* v. *Houston Chronicle Publishing Co.*, 300 F.2d 273, 277 (C.A.5); *Celanese Corp. of America* v. *NLRB*, 291 F.2d 224 (C.A.7), cert. denied 368 U.S. 925.

II. The Board Abused Its Discretion in Failing to Dismiss the Representation Petition Because of the Involvement of Supervisors Guzman and Feliciano in Sponsoring the Union and Obtaining and Influencing Employees to Sign Union Authorization Cards.

The Board has long followed a policy of dismissing a petition if it appears that the authorization cards supporting that petition were obtained through the active participation of supervisory personnel. *Southeastern Newspapers Inc.*, 129 NLRB 311; *The Wolfe Metal Products Corp.*, 119 NLRB 659; *Desilu Productions Inc.*, 106 NLRB 179.

More than thirty days before the election was held and even before it was scheduled the Company submitted to the Regional Director evidence, which it had only recently obtained, that supervisors Haydee Feliciano and Josie Guzman had instigated, initiated and sponsored the Union among its employees and directly solicited and encouraged employees to sign authorization cards for the Union. These supervisors were extremely active in all aspects of Union activity, including attending Union meetings, acquainting the employees with the Union's organizers, urging employees to sign Union cards and to get other employees to do so (RA. 3-12).

In *Southeastern Newspapers Inc., supra,* 129 NLRB at 312, the Board determined, on the basis of an administrative investigation, that a supervisor participated in obtaining cards submitted to establish a showing of interest in support of the union's representation petition. Pointing to its policy that such solicitation by a supervisor impairs a union's showing of interest the Board dismissed the peti-

tion. In *Desilu Productions Inc., supra* 106 NLRB at 182, the Board found that two employees "were in effect, solicited" by a supervisor to join the union and that the "showing of interest" on which the representation petition was based "is necessarily impaired by his activities in the organization of the (Union)." In the *Wolfe Metal Products Corp., supra,* 119 NLRB at 660-661, where a supervisor spoke in favor of the union at an employee organizational meeting and to employees in the plant and also solicited the signatures of three employees, the Board held that such solicitation by a supervisor "does in fact impair a petitioner's showing" and dismissed the petition.

The material submitted to the Regional Director by the Company contains *prima facie* evidence of supervisory participation in the Union's organizational campaign to a degree equal to or even greater than that found in the cited cases where the Board dismissed the petition. Yet the Regional Director, not only refused to dismiss the petition in the instant case but refused even to conduct an administrative investigation. The only basis given by the Regional Director for refusing to dismiss the proceeding was that the objections based on the conduct of these supervisors were not raised within five working days of the close of the hearing (RA. 2).

It is submitted that the Regional Director's strict reliance on the purported five day rule is in error. There is no provision in the Board's Rules and Regulations and Statements of Procedure publicizing this five day rule. None of the published cases cited herein refer to any five day rule for raising this issue. The Regional Director never brought this five day rule to the attention of the Company before he summarily dismissed the Company's request.

Since it has been shown that the Board consistently has dismissed representation petitions where supervisors have participated in the Union's organizational campaign and the Company has shown that there was such activity on the

part of its supervisors in the instant case, the Board's refusal to dismiss the petition, or even to conduct an administrative investigation, was arbitrary and capricious.[7]

A further basis for reversible error in this proceeding is the exclusion of the Company's request for an administrative investigation and the affidavits in support thereof from the record of the representation proceeding (RA. 1). If General Counsel's position, that these documents are not part of the record in the representation proceedings, was followed by the Regional Director and the Board in the representation proceeding then these papers were not transferred to or reviewed by the Board in that proceeding. Section 102.68 of the Board's Rules and Regulations provides that "the record in a representation case transferred to the Board is to include, *inter alia,* motions, rulings, . . . or other documents submitted by the parties to the Regional Director." The Company's request for an administrative investigation, the affidavits submitted in support thereof, and the Regional Director's denial of the request are clearly "rulings" and "other documents" within the meaning of the rule.

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[7] While we are aware that the Board has taken the position that a union's showing of interest may not be litigated in representation proceedings, the Board may not consider supervisory interference as the basis for dismissing representation petitions in some cases and, at its whim, refuse to dismiss a representation petition in another case when the same basis for dismissal is present. This is the very essence of arbitrary and capricious action which the courts should correct. See e.g., *NLRB* v. *Sanitary Laundry, Inc.,* 441 F.2d 1368, 1369 (C.A. 10) where the court noted "[t]he Board's discretion, though indeed broad, must be exercised with consistency in order to further the purpose of the Act" (441 F.2d at 1371).

III. The Action of the Board in Sustaining the Validity of the Election Was Unreasonable and Without Substantial Evidence to Support it

In the instant case, as in the cases cited on pp. 7-8 of this brief, the Board's inference that the conduct objected to did not have the tendency to affect the vote of those casting a ballot, is clearly erroneous, and the Board's finding that this election was valid is thus not supported by substantial evidence in the record as a whole.

The Company urges, as it did before the Board and the Regional Director, that the certification of representation election is invalid because the Union's conduct, which when considered individually and cumulatively, caused the election to be "conducted" in less than the laboratory conditions so often promised by the Board and required by the courts. *Home Town Foods, Inc.* v. *NLRB,* 379 F.2d 241, 244 (C.A. 5).

A. The Union's injection of Congressman Badillo and Commissioner Santaella into the Campaign

On or about Tuesday, May 2, 1972, Union vice president Abreu, without permission, during working time, brought United States Congressman Herman Badillo and Commissioner Irma Santaella into the Kress store. After entering, they went to the work stations of the employees and solicited their support and membership in the Union (A. 18).[8] The affidavit of Bernardo Martinez, submitted to the Regional Director, explains that Badillo and Santaella told the employees that "if the Union won, they would get wage increases, even though the Government had frozen everybody else's wages" (A. 136). Badillo also told the

[8] This activity is admitted in the Union's official newspaper, (THE DISTRIBUTIVE WORKER, May, 1972) which points out that Congressman Badillo and Commissioner Santaella told the workers to vote for the Union (A. 135).

employees that if the Union won the election, they would get a Puerto Rican manager in the store. Abreu admits that Congressman Badillo "may" have made such a statement because, as Abreu put it, "this is one of his fights" (A. 16).

In the subsequent affidavit submitted by Martinez to the Board, he described how Badillo, during the course of his electioneering on behalf of the Union, had promised that three new Federal projects were scheduled to open in the area (A. 108). The day before the election, the Union told the employees in a leaflet that it had been advised by Congressman Badillo that three projects had been approved by the Federal, State, and City governments to be built for this community (A. 32).

The fact that Badillo and Abreu were working in tandem is shown by Martinez's affidavit. Martinez testified:

> "At one time when I was near Abreu and Badillo, Abreu pointed to me and told Badillo that I was going to vote against the Union, that I would vote for the Company. Mr. Badillo told me to vote for the Union, that I would get more money. Mr. Badillo walked on, but Mr. Abreu called me away and told me privately that if I would help him to get the Union into the store, he would take care of me. Then, he walked ahead and caught up with Mr. Badillo." (A. 136)

The imposition of Congressman Badillo and Commissioner Santaella into the store to electioneer among the employees at their work stations; the injection of the issue of racial prejudice by Congressman Badillo, implying that the company would not appoint a Puerto Rican manager and promising employees that, with a Union, they would get a Puerto Rican store manager;[9] the presence of Com-

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[9] This statement is also objectionable because it promises employees that the Union can control the Company's choice of super-

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missioner Santaella, of the New York Human Relations Commission when he made the statements; Badillo's promises (which because of his government position would be given special weight) that if the Union won, the employees would get wage increases even though the Government had frozen everybody else's wages; his promise and the Union's subsequent announcement that it had been informed of the approval of three new government projects to be built in the area, clearly improperly influenced the employees and would have invalidated the election if a government official favoring an employer had engaged in such conduct.

The Board has invalidated elections where government officials such as a mayor or members of a city council have attempted to aid employers by pointing to the economic benefits to the community, in the course of campaigning against a union. *Universal Manufacturing Corp. of Mississippi,* 156 NLRB 1459; *Henry L. Siegel Co.,* 172 NLRB 825, enf'd as modified, 417 F.2d 1206 (C.A. 6), cert. denied 398 U.S. 959; *Dean Industries, Inc. & Howard Stafford, Mayor of Pontotoc, Mississippi,* 162 NLRB 1078, 1092-1094.

Certainly if an employer could be held liable for the action of the Mayor in *Henry L. Siegel Co., supra,* the Union should be held responsible for the statements implying racial prejudice to the Company made by Congressman Badillo as the Union vice president escorted him through the store.[10]

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visors. It is well settled that a union's attempt to dictate an employer's choice of supervisors is an unfair labor practice. *Laborers Int'l. Union of No. America, AFL-CIO, Local 478* (204 NLRB No. 32, 83 LRRM 1443). Nor could the employees evaluate this remark as the Board so sanguinely suggests (Board's Brief, p. 16). Not only because of the authoritative source from which it came (a U. S. Congressman) but because the store manager of this particular store, Frank L. Marks, was not obviously Puerto Rican.

[10] The Board's argument that Badillo should not be considered the Union's agent, is without foundation. The Union brought him

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Indeed, by injecting into the campaign the wholly extraneous issue of the store manager's lack of Puerto Rican heritage, the Union, by its ally, Congressman Badillo, plainly violated the Board's standards established in *Sewell Manufacturing Company,* 138 NLRB 66, to evaluate election campaign propaganda on racial matters. As noted in *Universal Manufacturing Corp. of Mississippi, supra,* 156 NLRB at 1465, "the Board will not tolerate racial propaganda unless it meets the following conditions: the statements must be truthful, temperate, and germaine to his party's position; and they must not deliberately seek to overstress and exacerbate racial feelings by irrelevant inflammatory appeals."

Still another reason exists for invalidating the election because of the imposition of government figures into the campaign. The courts and the Board have repeatedly recognized that, in labor matters, the Government is legally bound to be completely neutral, and the representatives of the Government should remain aloof from this area of conflict.[11]

This Court in *NLRB* v. *District 65 Retail, Wholesale & Department Store Union,* 375 F.2d 745 (CA 2), enforced an order of the Board condemning the Union's actions in

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into the store, accompanied him when he electioneered among the employees, even pointed out employees for him to talk to, and boasted of his support. At no time did the Union tell the employees that Badillo's statements represented his personal views and not those of the Union. And, particularly in view of Abreu's knowledge that Badillo would be likely to make such statements because this was "one of Badillo's fights" (A. 16), the Union must be held responsible for Badillo's statements.

[11] See, e.g. *NLRB* v. *Fresh'nd-Aire Co.,* 226 F. 2d 737 (C.. . 7), where the election was set aside because a field examiner of the Board had appeared at a union meeting and played a piano at a union social gathering. See also, *Custom Molders of Puerto Rico,* 121 NLRB 1007, 1009, where the Board pointed out that its policy was to "eliminate . . . the possible implication of U. S. Government endorsement of any party to an election."

entering employers' premises uninvited, with large groups of organizers, in an attempt to organize the employees. In that case, the Board's trial examiner pointed out that the conduct of a mass of union representatives by sheer force of moving bodies imposed the union's will over that of the employer in his own premises, and that this constituted proscribed coercive conduct. (*District 65, Retail, Wholesale & Department Store Union,* 157 NLRB 615, 623.)

We submit that in the instant case the invasion of the Company's premises accompanied by such important government figures as Congressman Badillo and Commissioner Santaella (who obviously had certain power over the Company) to electioneer among the employees on their working time was as coercive as the conduct condemned in *NLRB* v. *District 65, supra.*

At the very least, the instant case comes in the category to which the Board referred in its opinion in *General Shoe Corporation,* 77 NLRB 124, where the Board held that conduct that creates an atmosphere which renders improbable a free choice in an election may invalidate the election even though such conduct may not constitute an unfair labor practice. Here, the standards dropped too low because of the assistance given to the Union by Congressman Badillo and Commissioner Santaella, both with regard to the statements made and their presence in the store at the behest of the Union. The election, therefore, must be invalidated.

B. The Electioneering of Union Vice President Abreu within the "No Electioneering Area" during Voting Hours

The Company submits that the actions of Union vice president Abreu in stationing himself within the "No electioneering Area" fixed by the Board agent during the voting hours and electioneering while the employees were going to vote constituted grounds for invalidating the election.

The election was conducted on the store's stockroom floor, which could only be reached by a stairway leading off the aisle next to the information desk (A. 152, 237-239, 243). To maintain the area where the employees had to pass to vote free of electioneering by the parties, the Board agent designated the area around the bottom of the stairs, including the area in front of and around the information desk a "no electioneering area" and excluded, during voting hours, all Company supervisors and Union representatives (A. 236). The Board agent specifically instructed the Company and Union representatives (including Abreu) that, during the voting, none of the Company's supervisors and none of the Union's representatives were to be in the area (A. 236, 265). Complying with this directive, the Company instructed all supervisory personnel to stay away from this area (A. 244-246, 262, 264-265).

Abreu, however, in direct violation of the Board's agent's instructions, stationed himself in the "no electioneering area" and spoke to employees on their way to vote. The consistent testimony of Briar and Culbertson[12] is that they saw Abreu speak to several employees in the aisle immediately adjacent to the information desk as they were walking to the polls.

Briar testified that Carmen Valentin was one of the employees Abreu talked to on the way to the polling area. Culbertson testified that he saw Abreu talking to Carmen Valentin and Mary Gomez (A. 246-248, 257-258, 265, 266-267, 293-295). Culbertson further testified that Abreu remained in the "No Electioneering Area" for

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[12] In addition, both Culbertson and Briar saw Abreu talking to Alphonso Narvaez in the "no electioneering area" (A. 267). While Narvaez' vote was challenged, and the challenge was upheld, the evidence shows that, following one of his conversations with Abreu, Narvaez commenced conversations with eligible voters and then returned and spoke to Abreu in the "no electioneering area" (A. 246-248, 267).

thirty minutes after the election began (A. 87). Porfirio Fernandez[13] testified that he was on vacation the day of the election. He first came into the store between 2:30 and 2:45 p.m. and headed for the stairs to get his check. At that time, he saw Abreu standing in the "no electioneering area," and Abreu told him "Vote for the Union, the Union is going to win. Don't let yourself be fooled by the Company" (A. 336-338). Later that afternoon, just before Fernandez went up to vote, between 4:30 and 4:45 p.m., he again saw Abreu in the "no electioneering area" and, this time, Abreu told him "I count on your vote" (A. 334-335, 339).

On the basis of this evidence, the Hearing Officer concluded that: ". . . the most that can be established is that Abreu spoke briefly to 2 of 51 eligible employees at a point on the outside fringe of the no electioneering area described by the Board Agent" (A. 48).

Even if we were to accept, *arguendo,* the Hearing Officer's finding that Abreu spoke to only 2 of 51 eligible voters, such conduct would have substantial impact on the election. The revised tally shows that 28 votes had been cast for the Union and 25 against (A. 74). A shift of 2 votes would have changed the results of this election.

In *Standard Knitting Mills, Inc.,* 172 NLRB 1122, the Board pointed out that the impact of objectionable conduct should be assessed as though the unit consisted solely of the difference in the vote. The Board stated *id.* at 1123:

> "Moreover, we cannot view the Employer's misconduct as isolated in view of the additional circumstances of this case. Although there were approximately 3,000 employees in the unit, the Petitioner lost the election by only 17 votes, or 21 votes if it can be assumed that

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[13] The Hearing Officer did not credit Fernandez' testimony. For the reasons shown pp. 19-21, *infra,* the Company contends that this was an error. In noting that Abreu spoke to only 2 employees the Hearing Officer omits Fernandez.

the challenged ballots were against the Petitioner. In essence, therefore, the impact of the misconduct is the same as if the entire unit consisted of, at most 21 employees." (Cases cited in footnotes omitted.)

The Hearing Officer erred in rejecting the Company's contention that the election should be set aside under the *Milchem* rule. In *Milchem, Inc.*, 170 NLRB 362, 363, the Board established the rule that "conversations between a party and voters, while the latter are in a polling area waiting to vote, will normally, upon the filing of proper objections, be deemed prejudicial without investigation into the remarks." See also *Modern Hard Chrome Services Co.*, 187 NLRB 82. In subsequent decisions, the Board has made it clear that the *Milchem* rule was to be applied strictly in the area in which electioneering is not to be permitted as "established by the informed judgment of the Regional Director and his agent conducting the election. They are on the scene and are familiar with the physical circumstances surrounding the location of the polls." *Marvil International Security Services, Inc.*, 173 NLRB 1260.[14]

In *Milchem*, the Board pointed out that by attaching a sanction to the breach of this rule "the rule assumes that the parties will painstakingly avoid casual conversations which would otherwise develop into undesirable electioneering" and insure that the parties "will take pains to assure complete compliance with the rule by issuing appropriate instructions to their agents, officials and representatives" (170 NLRB at 363). Where a union agent has electioneered within the boundaries set by the Board agent, even though such electioneering took place outside the polling area, the Board set aside the election of the winning union. *Star*

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[14] In *Marvil*, the Board did not vacate the election because the electioneering occurred beyond the established no electioneering area. *Marvil International Security Services, Inc., supra*, 173 NLRB at 1260.

Expansion Industries Corp., 170 NLRB 364, 365. The Hearing Officer's refusal to set aside the election here, because Abreu's conduct occurred "at a point on the outside fringe of the no electioneering area described by the Board Agent" (A. 48) does violence to the Board's own standards applied in the above cited cases.[15] Under the circumstances, Abreu's actions in stationing himself in the "No Electioneering Area" and conversing with employees on their way to the polls in wilfull violation of the Board agent's officially established limits and at a time when the Company had removed its supervisors from that area in compliance with the Board agent's instructions, constitutes a clear violation of the *Milchem* rule and requires that this election be held invalid.

Even without Fernandez' testimony, the evidence establishes that Abreu's actions violated the *Milchem* rule. The Company submits, however, that the Hearing Officer erred in rejecting Fernandez' testimony. While we understand that questions of credibility are normally for the trier of the facts, where the Hearing Officer's rulings are erroneous, reviewing courts and administrative agencies, relying on *FCC* v. *Allentown Broadcasting Corp.*, 349 U.S. 358, 363, 364, have reversed such credibility resolutions. See, e.g., *Tom Johnson, Inc.*, 154 NLRB 1352, enf'd. 378 F.2d 342 (C.A. 9); *K.O. Steel Company, Inc.*, 172 NLRB 216; *Winn-Dixie Stores, Inc.* v. *NLRB*, 448 F.2d 8 (C.A. 4).

In the case at bar, the Hearing Officer states that he discredited Fernandez because of his demeanor, his testimony was allegedly vague and unresponsive especially on cross-examination, he allegedly contradicted his testimony on

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[15] The Hearing Officer's and the Board's reliance upon *Harold W. Moore & Son*, 173 NLRB 1258 is misplaced. (Board's brief p. 7) Unlike the instant case, the electioneering in the *Moore* case took place *not* within the proscribed area but 30 feet from the entrance to the warehouse, which entrance was itself about 30 feet from the voting area.

direct in placing the time of an incident, and he was not corroborated by Culbertson and Briar (A. 47).

While the Hearing Officer does not state what in Fernandez' demeanor discredited him, it must be understood that Fernandez was a Spanish-speaking porter who could not read or write English, and his testimony was adduced through an interpreter at the hearing. Certainly a person in this position would be frightened in testifying at an official government hearing and his demeanor may very well have shown fright and nervousness.

The Hearing Officer does not point to any specific testimony that was vague or unresponsive. An examination of Fernandez' testimony on the record demonstrates that it is far more clear and forthright than that of Union organizer Abreu and Union organizing committee member, Carmen Valentin, whom the Hearing Officer credited, even though their self-interest was patently obvious and they did not suffer from the same language disability as Fernandez.

The Hearing Officer points to the fact that on cross examination, Fernandez places the time of his second conversation with Abreu as somewhere between 3:30 and 3:45 p.m. and claims this contradicts Ferdandez' direct testimony in this regard (A. 47). This is not a correct summary of Fernandez' testimony. On cross-examination, Fernandez stated consistently with his testimony on direct and with his affidavit submitted to the Board that this conversation took place between 4:30 and 4:45 p.m. (A. 144, 339). Thereafter, he was subjected to a series of harassing and confusing questions by Union's counsel until he became confused and upset (A. 339-41). Thus, the record shows the following exchange:

> Q. Your second conversation with Mr. Abreu, what time was that? A. The same time I answered a minute ago.
>
> Q. The second conversation. A. I told you the time, you check your papers there.

Q. Will you tell me again, please? A. No, sir.

Hearing Officer: I direct the witness to answer the question.

Miss Balk: I think the witness has been asked the same questions so many times that I can't blame him for getting upset.

Hearing Officer: . . . I direct the witness to answer the question put to him at this time.

A. I am more confused with the questions asked me twenty times. I am a little confused. (A. 341)

Over the objections of Company counsel, the Hearing Officer permitted this harassment of the witness to continue until the Union counsel elicited the confused response that the time of the second conversation occurred between 3:30 and a quarter to 4:00 (A. 342).[16] The Hearing Officer's reliance upon the fact that neither Culbertson nor Briar witnessed this incident is even more patently erroneous. Both were involved in attempting to keep the store operating while the 51 eligible employees who normally manned the store were in the process of voting (A. 257-289). Briar was out of the store for a period of time (A. 257). Under these circumstances discrediting Fernandez because Culbertson and Briar did not see the incident is like relying on the testimony of a witness who did not see the accident.

Even without the *Milchem* rule, Abreu's actions require that the election be invalidated under the Board's own standards.

In *Peerless Plywood Co.*, 107 NLRB 427, the Board set out a rule that employers and unions alike will be pro-

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[16] It should be noted that this difference in time could have been a slip of the tongue of the interpreter furnished by the Board. Since Company counsel was denied the right to have her own Spanish interpreter present to assist in the examination of this witness, there is no way the Company could tell whether the interpretation was accurate.

hibited from making election speeches on company time to groups of employees within 24 hours of the election time. The Board emphasized that it was attempting to achieve equality in electioneering by eliminating last minute speeches on company time that because of the unsettling effect on the employees tend to interfere with the sober and thoughtful choice which a free election is designed to reflect.

In the case at bar, it is undisputed that the Board agent attempted to maintain the area through which the employees had to pass to get to the polls free of the unsettling effect of even the appearance of any of the partisans by declaring the area off-limits to Company supervisors and Union organizers alike, and by thoroughly inspecting the area to make certain that there was no campaign literature there to disturb the prospective voters on their way to the polls (A. 243, 262-263). Abreu, by the very act of stationing himself in the proscribed area, and remaining in a position where prospective voters would have to pass him on the way to the polls, in direct defiance of the Board agent's directive, upset the equality of the electioneering in this case and provided an unsettling effect which tended to interfere with the employees' sober and thoughtful choice. When it is seen that the results of this election were decided by two votes at the most, it is clear that Abreu's actions require that the election be invalidated. See also *Star Expansion Industries Corp., supra* (the election set aside because of a union agent's wilfull violation of officially established limitations); *Matter of Detroit Creamery Company*, 60 NLRB 178 (set aside because union representative stationed himself during the election at a point in the plant where the employees would have to pass him on the way to the balloting room); *Kilgore Mfg. Co.*, 45 NLRB 468 (election vacated where union agent seated himself in his automobile within 200 feet of the polls and directly adjacent to the line formed by the voters going to the polls); and *Belks Department Store of Savannah, Ga., Inc.*, 98 NLRB 280,

where the Board pointed out that the agent's ". . . presence in the area where the employees were gathered while waiting to vote tended to interfere with the employees' choice of a bargaining agent. In particular . . . in the space in which the employees were required to traverse."

C. The activities of supervisors Guzman and Feliciano in support of the Union both before and after the representation petition was filed

The law is settled that "supervisory pressure upon employees in the selection of a bargaining representative is coercive. It is not necessary that it be proved that such pressure and coercion affect the results of the voting." *Turner's Express Inc.* v. *N.L.R.B.*, 456 F2d 289, 291 (C.A. 4), citing *N.L.R.B.* v. *Metropolitian Life Insurance Co.*, 405 F.2d 1169 (C.A. 2), and *N.L.R.B.* v. *Roselon Southern, Inc.*, 382 F.2d 245 (C.A. 6).

Although the Company adduced substantial evidence demonstrating that supervisors Guzman and Feliciano had been involved extensively in Union activities both before and after the representation petition was filed, the Board overruled this objection, adopting the Hearing Officer's Report that Guzman and Feliciano were "low level" supervisors, their activities ceased after March 10, and the Company had engaged in an extensive campaign so the employees were not misled as to the Company's position (A. 49-54).

The Company submits that the findings that Guzman and Feliciano are "low level" supervisors is prejudicial error and not supported by the record considered as a whole.

At the representation hearing on March 10, the Union not only stipulated that department managers Guzman and Feliciano are supervisors within the meaning of the Act (A. 202), but the record contained uncontradicted testimony that they had authority to recommend discipline (A. 208), transfer employees (A. 208, 212), recall employees (A. 209), discharge employees (A. 210, 214), train new employees (A. 272), direct the work of employees, including the assignment of work schedules, breaks, days

off, lunch periods, vacations, and to effectively direct employees in the performance of their work (A. 210, 211). It is significant that the Union representatives who entered into this stipulation were accompanied at the representation hearing by Josie Guzman and four other employees to advise the Union regarding the duties of employees (A. 372, 380, 385). On the basis of the Union's stipulation and this record, the Regional Director held that Guzman and Feliciano, among others, effectively recommended recall, lay-offs, transfers, wage increases and discharges, make work and vacation schedules, train and direct employees, and attend meetings of supervisory employees (A. 5).

In the face of this determination, showing the extensive authority and control exercised by supervisors Guzman and Feliciano, we submit that the Board committed prejudicial error[17] in adopting a contrary determination in the objec-

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[17] Since the extent of the supervisory authority of Guzman and Feliciano was fully litigated at the March 10 representation hearing, the action of the Hearing Officer in the objection hearing, over objections of Company counsel, in questioning witnesses and permitting the Union to adduce evidence, and in making findings as to the extent of their supervisory authority, was clearly erroneous and prejudicial to the Company. *See, e.g. NLRB* v. *Air Control Products, etc.*, 335 F.2d 249, 251 (CA 5) where the court upheld the Board's refusal to permit an employer to introduce evidence concerning the unit issue in a subsequent hearing. The court described what occurred as follows: "From the time the Union petition initiating the RC case was filed . . . the question of whether certain installers were employees or independent contracts [sic] was an issue in the case. At the hearing provided by the regulations, the Union introduced sworn testimony bearing upon the duties of the installers. These witnesses were not cross-examined. Nor was evidence introduced by the Employer although its representatives were present at the hearing and given a chance to testify and bring forward all available evidence. That they did not was wholly a matter of deliberative choice after full advice". While in *Air Control,* the subsequent hearing was held in the related unfair labor practice proceeding, we submit that the same result should apply in the instant proceeding and the Union should not have been permitted to relitigate in the subsequent objection hearing the issue which it had been given a full opportunity to present at the representation hearing.

tion proceeding that Feliciano and Guzman were "low level" supervisors, and relying on this determination, at least in part, as the basis for its ultimate finding that the activities of these supervisors did not influence the employees in favor of the Union (A. 69).

Moreover, whether or not Guzman and Feliciano were "low level" supervisors does not minimize the effect of their activities.

As recognized by the court in *Turner's Express, Inc.* v. *NLRB,* 456 F2d, 289:

> "[t]he Board designation of . . . 'minor supervisors' is not supported by the evidence or the law. The Act does not grade supervisors as major or minor. An individual is either a supervisor or an employee . . .
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> * * *
>
> "In industry an employee is more concerned about the attitude of his immediate supervisor than he is about the feelings of the company president. This is similar to the Army, where a private is more concerned with the attitude of his corporal or sergeant than he is with the colonel or general, since the corporal and sergeant control his day-to-day life." (id. at 293, 294)[18]

The court in *Turner's Express* indicated that the Sixth Circuit shared its view when it stated:

> "In *N.L.R.B.* v. *Roselon Southern Inc.,* 382 F.2d 245 (6th Cir. 1967), the Court held that if a person alleged to be a supervisor performs any one of the functions set forth in the statutory definition, he meets the test, and it is not necessary that such person is required to regularly and routinely exercise such powers, but it is the existence of the power that determines his

[18] In this very case, Union witness Morales testified that her immediate supervisor (in the same level of supervision as Feliciano and Guzman) was so important to her that she did not want to be transferred from her department (A. 710).

> status as a supervisor. The employee in Roselon might be described by the present Board as a 'minor supervisor', . . . However, the Court found her to be a supervisor and her pre-election pro-union activity to be coercive on other employees so that the election was set aside." (496 F2d at 292)

There is ample evidence that Guzman and Feliciano engaged in substantial activity on behalf of the Union both before and after the petition was filed. While the Board refused to permit the Company to adduce any evidence concerning their Union involvement prior to the date the petition was filed, the evidence submitted to the Regional Director, in support of Company's request for an administrative investigation, demonstrates that the two supervisors were the instigators, initiators, and prime movers of the Union activity in the store (RA. 3-12).

The Company submits that it was error to exclude evidence regarding the supervisory involvement prior to the date the representation petition was filed. Such conduct may properly be considered as it lends meaning and dimension to related post petition conduct.[19] *See, e.g., Flint Motor Inn Co.,* 194 NLRB No. 115: 79 LRRM 1040, 1041, fn. 2. *See also NLRB* v. *Dakin & Co.,* 477 F2d 492 (C.A. 9) where the court refused to permit the Board to apply mechanically the petition filing date as the cut-off date for receiving testimony.

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[19] The Company was circumscribed and limited in its examination of witnesses because it was not permitted to adduce evidence shown in the affidavits submitted to the Regional Director in support of the request of an administrative determination (RA 3-12) that Guzman and Feliciano had attended all Union meetings since its formation and obtained a number of authorization cards. Since the Company was not permitted to adduce the evidence which would have reflected on the Union witnesses' credibility, the Hearing Officer credited the testimony of Guzman and Feliciano that their sole Union activity involved attending one or two Union meetings and obtaining one Union card, while he discredited the testimony of Company witnesses Matias and Garcia that these supervisors had engaged in extensive Union activities.

Moreover, the Company submits that the Board should have given substantive weight to the pre-petition activity of the supervisors in obtaining authorization cards under the doctrine of *NLRB* v. *Savair Mfg. Co.*, 414 U.S. 270. In *Savair,* the Supreme Court condemned the pre-election misrepresentations of a union in obtaining authorization cards (including pre-petition misrepresentations) and voided an election won by the union. The Court stated:

> "Whatever his true intentions, an employee who signs a recognition slip prior to an election is indicating to other workers that he supports the Union. His outward manifestation of support must often serve as a useful campaign tool in the Union's hands to convince other employees to vote for the Union, if only because many employees respect their co-workers' views on the unionization issue. By permitting the Union to offer to waive an initiation fee for those employees signing a recognition slip prior to the election the Board allows the Union to buy endorsements and paint a false portrait of employee support during its election campaign."

We submit that improperly obtained authorization cards, whether the objectionable conduct involves union initiation reductions as in *Savair* or supervisory participation as in the instant case, paints a false portrait of employee support and constitutes grounds for vitiating the representation election.

Since *Savair,* the Board has stated that it will consider pre-petition misrepresentations in obtaining authorization cards in determining whether or not to invalidate an election. In *Gibson's Discount Center, etc.,* 214 NLRB No. 22; 87 LRRM 1291, 1292 the Board pointed out that since a union must have authorization cards from at least 30 percent of the bargaining unit employees prior to filing the petition, most solicitations to sign cards occur prior to

filing of the petition. Thus, it would severely circumscribe the *Savair* doctrine to limit consideration to post-petition waiver of initiation fees.

The credited evidence[20] in the objection hearing demonstrates that the Union activity of supervisors Guzman and Feliciano continued even after the representation petition was filed.

Contrary to Union vice-president Abreu's self-serving testimony that the Union collected no more authoriztion cards after filing the representation petition (A. 550), the Union's own witness, Feliciano, admitted that she had one of her employees sign a union card in the presence of other employees after the petition was filed, and this card was turned in to Carmen Valentin of the Union organizing committee (A. 596-597, 601, 603).

Supervisor Guzman, also called by the Union as a witness, admitted that she attended two Union meetings, at least one of which was in March (A. 369).

The activity at this Union meeting, which occurred more than two weeks after the petition was filed and shortly before the representation hearing of March 10, demonstrates how deeply involved Feliciano and Guzman were in the Union campaign. Not only were both Feliciano and Guzman present at the Union meeting at which the Union attempted to get a list of people for the Union and cards and where

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[20] While we understand that under normal circumstances, credibility determinations are for the Hearing Officer, where the record demonstrates that the Hearing Officer made erroneous rulings, circumscribing the examination of witnesses so that their credibility could not be tested, refused to permit the Company to file a brief which would call his attention to the salient evidence, and otherwise prejudiced the Company in the presentation of its case (A. 183), his credibility resolutions may be re-examined, and, if found to be implausible, need not be accepted by the Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474; *NLRB* v. *Florida Steel Corp.*, 308 F2d 931, 936 (CA. 5).

the benefits of the Union were described, but Guzman was also elected a member of the Union organizing committee (A. 381, 372, 380, 384).

Union vice-president Abreu admitted that the purpose of a union organizing committee is to lead a group of workers into organization (A. 661), and that the members of the Union organizing committee in this case were the leaders in the shop (Tr. 670).

The evidence showed that this organizing committee was supposed to transmit information about the Union and to try and get employees to join the Union (A. 350, 572). Abreu himself admitted that the organizing committee consisted of the leaders of the union movement, the people who were the most active and "who wants mostly the union, they got confidence and are loyal to the cause" (A. 581). Abreu also admitted that he instructed the members of the Union organizing committee to get those employees who were not already in the Union, to join (A. 584).

On March 10 Guzman attended the representation hearing on behalf of the Union as a member of the Union organizing committee (A. 372, 577-578).

The continuing active role played by Guzman is further demonstrated by the fact that she received a check from the Union dated March 29, 1972 (A. 153), ostensibly to make up for lost pay for attending the hearing on March 10, 1972 (A. 394, 398-399). But the undisputed documentary evidence shows that Guzman had not lost any pay for being off on March 10 (A. 724).

The Company's attempt to have the supervisors disavow their pro-Union interest to the employees met with no success. The record shows that after her Union activity came to his attention, Company president Brown met with Feliciano and asked her to tell the employees under her supervision that she was no longer supporting the Union in order that she might personally dispel the aura of Union support

previously created by her activities. Feliciano expressly refused to do so (A. 716-717). Brown had a similar conversation with Guzman asking her to disassociate herself from union activity and to tell her subordinates of this fact. Guzman also refused (A. 717).[21]

Guzman also admittedly did not advise the employees that she was no longer on the Union's organizing committee after March 10, and the Union significantly introduced no evidence that it ever notified the employees of this alleged withdrawal (A. 386-387). Accordingly, there was nothing to dispel the employees' understanding that these supervisors were still supporting the Union.

This Court has set aside an election where far less evidence of supervisory participation was involved. In *NLRB* v. *Metropolitan Life Insurance Company*, 405 F.2d 1169 (C.A. 2), this Court ruled that an election was invalid because certain supervisors were erroneously included in the bargaining unit and "it was not known to what extent if any [the supervisors] . . . engaged in pro-union activities and perhaps influenced the voting patterns of other employees" (*id.* at 1178).

The contention by the Hearing Officer that the alleged nearly "two month" hiatus between the last admitted objectionable conduct of supervisors Guzman and Feliciano was sufficient to negate the effects of this objectionable conduct is plainly without merit. Here neither Guzman nor Feliciano admittedly made any effort to recant or eradicate the effects of their objectionable activity. Nor did the Union make any effort to neutralize the effects of the supervisors activities. As noted in analogous circumstances, in *NLRB* v. *Kaiser Agricultural Chemicals, etc.*, 475 F.2d 374 (C.A. 5).

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[21] The Hearing Officer refused to permit the Company to adduce any evidence as to the reason it took no action against supervisors Guzman and Feliciano because of their Union activities (A. 717).

> "Its silence during the critical pre-election period reinforced the coercive effect of its supervisors statements and clearly indicated that it desired to reap the benefits of their misconduct . . .
>
> "In the present case, the 'period of tranquillity' may well have been perceived by the employees as the calm before the storm." (*id.* at 384)

The Hearing Officer's rationale that the influence of the supervisors' activities was dispelled by the Company's campaign[22] has even less validity. In *NLRB* v. *Hecks, Inc.*, 386 F.2d 317 (C.A. 4), the court clearly dispelled this argument. The court stated:

> "It is no answer that the company's anti-union position was abundantly known to employees . . .
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> • • • • •
>
> "Employees who were subject to having their daily work schedules and days off assigned by such supervisors, and who were aware that department heads occupied a more exalted status than the employees, could, thus, well be influenced in their determination to sign a union authorization, irrespective of their knowledge of their employer's attitude toward the union."
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> *Accord: Turner's Express, Incorporated, supra,* 456 F. 2d at 292.

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[22] The Company submits that it was error on the part of the Hearing Officer to permit the Union to introduce into evidence all of the Company's campaign literature to assess the impact of the supervisors activity while at the same time refusing to consider the totality of the Union's conduct. Conceivably if the vigorousness with which a company campaigns against a union may negate the Union's improper conduct, the totality of the Union's campaign would counter-act what the Company was trying to show (A. 575-576, 577).

D. The Union's Misrepresentation as to its Initiation Fees and Dues

The Company presented evidence to the Regional Director that the Union intentionally misled the employees concerning its initiation fees and dues. Thus, in the handbill distributed by the Union as the employees were leaving work on the night before the election, the Union stated:

> "As we have stated before at our meetings and we now confirm it to you on this handbill—the initiation fee to be a member of this Union is $5.00 and the dues are in proporation to your weekly salary." (A. 31)

That this statement misrepresented the actual initiation fee and dues which employees would have to pay if they joined the Union was demonstrated by the Union's own constitution which specifically provides that the initiation fee shall be $20.00 except that the fee for part-time workers shall be $12 (A. 128).

In finding that the Union did not misrepresent the initiation fees, the Regional Director accepted the Union's claim that its initiation fee through organization is $5.00 and that the $20.00 amount set forth in its constitution pertains to employees who join at a later date (A. 10). However, the Regional Director failed to consider that the leaflet deliberately fails to state that the $5.00 initiation fee applies only during the organization period, and that once the Union is elected, the employees would have to pay an initiation fee of $20.00. Certainly, employees who have not joined the Union during the organization campaign prior to the election would be less likely to vote for the Union if they knew that they would have to pay an initiation fee of $20.00 and not a $5.00 fee, which the Union untruthfully assured them was the initiation fee they would be obliged to pay.

Furthermore, if the Union's claim that it offers a lower initiation fee to employees who join the Union during the

organization campaign is true, then the Union's conduct must be considered objectionable in the light of the decision of the Supreme Court in *NLRB* v. *Savair Mfg. Co.*, 414 U.S. 270; that the waiver of initiation fees during a Union's organization campaign prior to an election is not permissible. This is the very practice condemned in Savair, because as the Supreme Court points out it permits the Union to buy memberships which paint a false picture of employee support. In this way undecided employees might be improperly influenced to vote for the Union.

The Union leaflet also misrepresented to the employees the amount of dues they would have to pay when it stated that "* * * the dues are in proportion to your weekly salary" (A. 31). In fact, the Union constitution (Part IV, Art. C, Sect. 2(b)(4)) provides that *all* monies due the union constitutes dues (A. 131) (emphasis added).

Thereafter, the Union constitution provides: that members absent from a meeting shall be required to pay a fine of $1.00 for every such absence; that every member must pay "inactive dues" of $5.00 per year at the time he or she becomes inactive; that members who are not employed in a Union shop or who are ill or absent from employment must pay Union dues of $2.00 a month; that members who receive welfare benefits or sick pay from any source shall pay dues on the amount of welfare benefits and sick pay received; that a dropped member, to be reinstated, must pay not only all his or her financial obligations to the Union, but also a reinstatement fee of not less than $20.00. Since these payments become merged with and part of dues owing by that member, such taxes, assessments and reinstatement fees constitute dues under the terms of the constitution, and are clearly not in proportion to the member's weekly salary (A. 128-133).

The Regional Director's conclusion that there was no misrepresentation concerning dues because the initiation fee was "correctly publicized as a fixed figure" is erro-

neous upon its face (A. 11). The thrust of the Company's position is that the Union concealed from the employees the fact that the initiation fee, as well as all the other obligations and charges, became merged into the dues obligation. Accordingly, the Union's assurance to the voters that they would only have to pay dues in proportion to their earnings was not corrected by the fact that the Union mentioned initiation fees as a fixed sum without also explaining that employees would be held liable for initiation fees as dues. Moreover, in view of the substantial list of financial obligations which become merged into dues, the Union's specifying only one of these items as a fixed sum does not correct the misrepresentation as to the others. In addition, as has been shown, the Union misrepresented the amount of the initiation fee itself.

The Regional Director's next conclusion that the Union's failure to advert to the fact that all monies due the Union constitute dues is merely an ambiguity and not a misrepresentation "in effect sweeps such misrepresentation under the rug". *Collins & Aikman Corp.* v. *NLRB*, 383 F.2d 722, 727 (C.A. 4).

Obviously, if the employees realized that they could become obligated as a condition of employment to pay substantial additional amounts of money over and above an amount proportionate to their weekly salary, they would be less likely to vote for the Union.

The Union's misrepresentation was heightened by the explanation in the Union's election eve leaflet that the dues were needed to support the organization (A. 31), a basis which the employees might be willing to accept. But they might not be agreeable to pay dues for fines for not attending membership meetings, assessments on their welfare payments and sick pay, and any taxes and assessments which the Union's General Council might adopt.

The most patently preposterous conclusion of the Regional Director is that the employees could evaluate the

issue of dues and assessments because the Company had explained the Union's dues and assessments in a previously issued leaflet.

It must be borne in mind that such matters as Union initiation fees and dues are matters concerning which the Union has special knowledge, so that the Union's misrepresentation would carry particular weight with the employees because they were spoken by the one in an authoritative position to know the truth. Not only would the employees be more likely to believe the Union's explanation of its own dues and initiation fees, but it will be noted that the Union's election eve leaflet branded the Company's explanations as "lies". The Union explains that it issued the leaflet because of the Company's tricks and "lies". It then goes on to state that the Company's mention of dues and initiation fees "is just another lie". In one way or another, the Union calls the Company a liar at least five times in this leaflet, and the entire tenor of the leaflet is that the Company is not to be believed.

When it is realized that the Union waited until the eve of the election to issue its leaflet contradicting the Company's attempted explanation[23] of the Union's dues and initiation fees so that even if the employees would believe it, the Company was not in a position to reply, it is apparent that the employees had no opportunity to or could not reasonably evaluate the issue, as the Regional Director incorrectly concludes (A. 12).

Such conduct by the Union was paticularly condemned by the Board in *Gummed Products Company,* 112 NLRB 1092, 1094, where the Board vacated an election when the union repeated, on the eve of the election, misrepresentations, in the face of contradictions by an employer.

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[23] The Company's explanation was distributed eight days prior to the election, yet the Union waited until the eve of the election to come out with its leaflet contradicting the Company's explanation (A. 102).

The Board has held that the cost of joining and remaining members in a union are very important matters to employees. *The Trane Company,* 137 NLRB 1506, 1509. See, also, *Bata Shoe Company,* 116 NLRB 1230, 1242.

The misrepresentations concerning the Union's dues and initiation fees separately are sufficient to invalidate the election. Together, these misrepresentations utterly distorted the costs of Union membership and benefits to the employees. As it has been shown that these misrepresentation concern matters of vital concern to prospective union members, that they are matters concerning which the Union has special knowledge of the true facts, that the Union's misrepresentations carried paticular weight as spoken by one in an authoritative position to know the truth, that the employees had no way of gaining independent knowledge of the falsity of the Union claims, that the misrepresentations were so timed to prevent any reply by the Company, the election should be set aside on this ground alone.

IV. The Total Effect of the Misrepresentations, Methods Used in the Election Campaign and Atmosphere Were Such as to Prevent a Free Choice

While any one of the acts of interference discussed in the previous portions of this brief is sufficient to support a conclusion that the election held on May 5, 1972, did not afford all employees an opportunity to express a free choice in the selection or rejection of their bargaining representative, this conclusion is even more compelling when the collective impact of all the improper acts of interference upon the employees is considered.

In *NLRB* v. *Trancoa Chemical Corp.,* 303 F.2d 456 (C.A. 1), the Court stated:

> ". . . we are not persuaded by the Board's view that the effect of even major misrepresentations may be

> diminished if, in the total picture, they are few in number. * * * some of the other misrepresentations, although not substantial in themselves, are at least of some consequence. Many a girl has been seduced one step at a time." (id. at p. 458)

In the case at bar not only were the employees subjected to the coercive effect of supervisors actively supporting the Union, the compelling presence of important government figures electioneering at their work stations injecting the emotionally charged highly extraneous racial issue into the campaign, the last minute electioneering by the Union vice president as they were going to the polls, material misrepresentations as to union dues, initiation fees and the Union's ability to control the Company's choice of supervisors, but there was also evidence of improper economic payments promised and actually given by the Union (A. 111-113).

Assuming, *arguendo,* the individual incidents are not sufficient, standing alone, to support a finding that the election was invalid when the entire panorama of improper events to which the employees were subjected is viewed as a whole, it is obvious that the employees could not have been provided an opportunity to exercise their right to make a free and untrammeled choice. Thus viewed, the impact of all improper events taken together is far greater than the sum of the impact of each incident viewed separately.

VI. In the Alternative, the Company Is Entitled to a Post-Election Hearing Since No Hearing Was Held on Six of Its Objections and the Board Denied the Company a Fair Hearing on the Remaining Objections and Challenges

Due process of law demands and the present rules and regulations of the Board (Sec. 102.69 (c), 29 C.F.R. 102.69

(c)) provide that where there is a substantial and material issue of fact relating to the validity of a representation election a hearing be conducted at some stage of the administrative proceeding before the objecting party's rights can be affected by an enforcement order. *Howell Refining Co.* v. *NLRB,* 400 F.2d 213, 218 (C.A. 5), and the cases therein cited. To be sure, the burden rests on the Company to establish that there is a material and substantial issue of fact. *Home Town Foods Inc.* v. *NLRB,* 379 F.2d 241, 242 (C.A. 5). However, what was said in *Neuhoff Bros. Packers, Inc.* v. *NLRB,* 362 F. 2d 611, 613 (C.A. 5) is applicable here: "In view of the record (in effect, the grant of summary judgment) we must assume that for the Board to prevail, any factual issues that may have properly been raised before the Board, are to be viewed most strongly from the standpoint of the Company. . . ." *Accord, NLRB* v. *Ortronix, Inc.,* 380 F.2d 737, 739 (C.A. 5). When all of the evidence is considered the Company submits it has satisfied the prescribed standards.

1. The Company submitted to the Regional Director evidence that the Union's election eve leaflet misrepresented the initiation fee and Union dues which would be charged employees if they became Union members. Thus, the Company showed that the Union stated its initiation fee was $5.00 (A. 31). That this statement is false was shown by the Union constitution which provides that the initiation fee shall be $20.00 (A. 128).

The Regional Director, without a hearing, and without even bringing the Union's claim to the Company's attention, dismissed this aspect of the objection because the "union explains that its initiation fee through organization is $5, and that the $20 amount set forth in its Constitution pertains to employees who join at a later date" (A. 10). Not only did the Regional Director accept the Union's bald claim in the face of the contrary evidence contained in the Union constitution, but there is no evidence that the Union

ever told the employees that the $5 figure applied only during a limited period. Clearly something more than the Union's bald assertion was required. At the least the evidence furnished by the Company placed in issue the validity of the $5 figure, a question which can be resolved only by a hearing. As the Supreme Court said in *NLRB* v. *Indiana and Michigan Electric Co.*, 318 U.S. 9, 28: "Findings cannot be said to have been fairly reached unless material evidence which might impeach, as well as that which will support its findings, is heard and weighed. Here, if all of the evidence had been weighed, the Company would have made out a *prima facie* case of misrepresentation which required that a hearing be held. See cases cited, *supra*, p. 38). Rather than conduct a hearing, the Regional Director made unilateral determinations of disputed fact.

The Union's election eve leaflet also stated falsely that Union dues were in proportion to the employee's weekly salary (A. 31). However, the Union constitution provides that all monies owing to the Union are dues, and this includes fixed charges not in proportion to the employee's weekly salary (A. 128-133). Thus the Company submitted evidence that Union dues are not in proportion to the employee's weekly salary. The Company's evidence was specific enough to satisfy its burden.

2. The Company submitted evidence to the Regional Director in the form of affidavits of two employees that at Union meetings, Union vice president Abreu, distributed a pamphlet describing the benefits in the Union's health and welfare plan and specifically told the employees that the Union had this plan in all of its contracts (A. 103-104). The Regional Director found this evidence insufficient, apparently because there was a denial by Union vice president Abreu and three other employees that this was said (A. 14). Clearly contrary to the Regional Director this conflict in the evidence demonstrates a "head-on clash" which can be resolved only by a hearing. *Howell Refining Co.* v. *NLRB*,

supra; Sonoco Products Co. v. *NLRB,* 399 F. 2d 835 (C.A. 9).

Still another reason exists for granting the Company a hearing on this issue. The Company had submitted to the Regional Director evidence which indicated that in at least one of its contracts the Union did not have the publicized health and welfare plan. The evidence which consisted of the official Union newspaper, showed that in reporting all other contract settlements the Union specifically set forth the fact that the health and welfare plan was a term of the settlement, but in describing the National Letter Shop contract the Union significantly omitted the health and welfare plan as a term of the settlement (A. 106-107). Rather than conduct a hearing, the Regional Director rejected the Company's evidence and accepted instead the Union's bald claim that the National Letter Shop contract has the Union's health and welfare plan (A. 14). There is no evidence that the Union ever submitted the contract to the Regional Director or that the Regional Director ever examined the contract himself. The Fifth Circuit Court in a similar case has condemned such procedure.

> "This treatment of the matter by the Regional Director would obviate the necessity of ever having a hearing on objections to an election. The disputed facts were resolved without testimony under oath, without cross-examination, and without the procedural safeguards of a hearing." (footnote omitted) *NLRB* v. *Lamar Electric Membership Corp.,* 362 F. 2d 505, 508 (C.A. 5).

3. The Company submitted evidence to the Regional Director that the Union enlisted the services of the U. S. Congressman Herman Badillo and Commissioner Irma Santaella of the New York State Human Rights Commission to electioneer among the employees on behalf of the Union and that in the course of such electioneering

Congressman Badillo made inflammatory racial statements and attempted to make the employees believe they would be benefitted with Federal building projects which, in view of his congressional position they might be led to expect (A. 16, 32). The Company's objections regarding the activities of Congressman Badillo and Commissioner Santaella in acting as Union agents, and by placing the imprimatur of government support on the Union was never resolved either by the Regional Director or the Board, and no hearing was ever held to consider the effects of the inflammatory racial statements by Congressman Badillo and the effects of the partisan participation by government officials on the employees vote.

In this posture substantial and material factual issues exist and they can be resolved only after a hearing. *Howell Refining Co.* v. *NLRB, supra*, 400 F.2d at 218 and cases therein cited at fn. 11. In *Home Town Foods Inc.* v. *NLRB, supra*, 379 F.2d at 244, the court stated: "One of the important issues is the effect of the election and pre-election practices of Union supporters on the minds of voters. The Courts have usually applied an objective test to determine whether interference with an election is sufficient to set it aside . . . subjective evidence . . . may carry the day as well."

4. The company submitted evidence to the Regional Director that the Union offered and actually gave economic inducements to employees to obtain their support and to have them convince other employees to join the Union or to vote for the Union. Thus the Company presented evidence that several employees had received checks in various amounts paid by the Union. The Regional Director dismissed this objection with the summary statement that this payment was reimbursement for lost wages for attending the March 10 representation hearing (A. 18). This finding was contrary to the evidence submitted by the Company in the form of an affidavit from one of the

employees who received the payment. The employee stated that the payment was not reimbursement for lost pay but to induce him to make an appearance at the hearing which would convince the other employees to vote for the Union (A. 139).[24]

Also, the Company submitted evidence that an employee had been offered a free trip to Puerto Rico if he would support the Union (A. 136-137). The Regional Director dismissed this objection because the Union witnesses involved *denied* making the offer (A. 18).[25]

5. The Regional Director failed in his supplemental decision to consider the cumulative effect of the Union's misrepresentations, activities of government officials on behalf of Union, pro-Union activities of supervisors, the promise of and actual grant of benefits, and the electioneering during the voting by Union vice president Abreu. *Howell Refining Co.* v. *NLRB, supra,* 400 F.2d at 218; *Home Town Foods, Inc.* v. *NLRB, supra,* 379 F.2d at 244.

6. The Company was denied a fair hearing on its Objections 5 and 7 and on the challenges because of the failure of counsel for the Region to conduct herself in an impartial manner. The Board's Field Manual requires that in hearings of this type counsel for the Region must be impartial, not act as a litigant nor even give the appearance of partiality.[26] Contrary to this injunction counsel for the Region engaged in vigorous cross-examination, as a litigant, of each of the Company's witnesses after the Union's

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[24] As shown, *supra,* another employee, Supervisor Guzman received the Union payment even though she lost no pay (Respondent's brief p. 32).

[25] *Home Town Foods, Inc.* v. *NLRB,* 379 F.2d 241-242 (C.A. 5); "We thoroughly realize, however, that the employer, without the aid of a hearing in which its objections could have been aired has faced a most difficult task in carrying its burden."

[26] NLRB Field Manual, Sec. 11424.4.

attorney had already cross-examined these witnesses on the same subject, prejudicially used affidavits of witnesses in the Region's file and made prejudicial statements on the record adverse to the Company's position without testifying under oath. To detail all instances of the prejudicial conduct engaged in by counsel for the Region would unduly extend this brief. Following are just a few of the more glaring examples of the objectionable conduct.

After the Union attorney had completed his cross-examination of the Company's first witness counsel for the Region asked the Union attorney if he would like to examine the witness' affidavit in her file, even though it was clear that Union attorney had completed his cross-examination and had not asked for such affidavit (A. 250). Not only was it improper to make available to the Union attorney affidavits from the Region's files without his request and after he had finished his cross-examination but the affidavit so offered did not even relate to the testimony of the witness on direct examination (A. 252-256).[27]

Thereafter in violation of the Board Manual's instruction to exercise self-restraint[28] counsel for the Region vigorously cross-examined every witness for the Company as a partisan, going over the same ground that had already been covered at length by the Union's attorney in a blatant attempt to discredit Company witnesses (A. 322-323, 433-440). Significantly counsel for the Region did not examine the Union witnesses[29] and even absented herself from the hearing room when a key Union witness was testi-

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[27] *NLRB Rules and Regulations,* Series 8, as amended, Sec. 102.118 (c).

[28] See Respondent's brief, p. 42 fn. 26.

[29] Counsel for the Region questioned one Union witness, Aviles, by asking leading questions to adduce testimony favorable to the Union (A. 71).

fying (A. 409).[30] Then, when the Company attempted to introduce a certain document to impeach Union witness Morales' credibility, counsel for the Region made the following prejudicial statements on the record:

> "Mrs. Taylor: I would object strongly to the admission of this. I looked at the payrolls. When I was investigating the case.
>
> Hearing Officer: Well, again—
>
> Mrs. Taylor: And my file notes do not reflect these things. I cannot testify about this. But I think the payroll should be brought in if this is going to be documented." (A. 737)

In addition, to refute the testimony of Company witness, Porfirio Fernandez, counsel for the Region called a Board agent, Robert Reisinger, who had taken a statement from Fernandez as a witness. Yet the Hearing Officer refused to permit the Company to call other Board witnesses who took statements (A. 536). Thereafter, although the issue involved Fernandez' statements concerning an affidavit taken by Board agent, Reisinger, and it appeared that additional affidavits had also been taken by the same Board agent as well as other Board agents, the Hearing Officer refused to permit Company counsel to inquire about the other affidavits (A. 541, 542). Clearly, by restricting Company counsel's examination of the Board agent it was impossible to attack his credibility or to rehabilitate Fernandez. The Hearing Officer subsequently discredited Fernandez' testimony (A. 47).

7. Although it was established that a critical witness for the Company on objection 5, Fernandez, could neither

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[30] In contrast to her treatment of Company witnesses, Counsel for the Region significantly failed to question Union witness Gomez about her affidavit in the Region's files although Gomez's testimony at the hearing attempted to cast doubt on statements in the affidavit favorable to the Company (A. 619-621, 623).

speak nor read English, the Hearing Officer refused to permit the Company to have its own Spanish interpreter present in the Hearing Room to assist Company counsel when he testified (A. 331-333). The Hearing Officer thereafter made credibility resolutions adverse to Fernandez' testimony based on minor discrepancies in his testimony which could conceivably be errors made by the Board's interpreter (see Respondent's Brief, *supra*, p. 17 fn. 13).

8. Although the Board's rules and regulations[31] provide that only such portion of an affidavit in the Board's files containing subject matter which relates to a witness' direct testimony may be made available for purposes of cross examination, the Hearing Officer refused to sectionalize the witness' affidavit containing impermissible material and made available to Union counsel all material contained in the witness' affidavit (A. 278). It cannot be determined at this time to what extent Union counsel used this improperly provided material in his examination of Company witnesses who were thereafter discredited by the Hearing Officer.

9. The Company was denied administrative fairness and due process of law in the hearing on the challenges to the ballots of Maria Aviles, Sonia Morales and Carmen Valentin. The Hearing Officer credited the unsupported testimony of Carmen Valentin and ignored, without reason, documentary evidence[32] submitted by the Company

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[31] NLRB Rules and Regulations Series 8, as amended, Section 102.118(c).

[32] To refute Valentin's claim that she had not quit but was on vacation during the two week period, April 1 to April 15, 1972, the Company introduced into evidence its vacation schedule and instructions which show that vacations are not scheduled in the peak selling periods such as Christmas, Easter, School Openings (A. 727-728, 729). The period Valentin claims she was on vacation was during Easter which fell on April 2 that year (A. 729).

as well as the mutually corroborative testimony of Company's witnesses Marks and De Leon (A. 310, 316, 411, 426-428).

With respect to the challenges to the ballots of Aviles and Morales, the Hearing Officer ignored the testimony of the Union's witness that the display department employee before Aviles and Morales worked solely on display and performed no selling work (A. 458). In overruling the Company's challenges, the Hearing Officer accepted the contradictory, evasive and inherently implausible testimony of Aviles and Morales and rejected, without reason, the testimony of Company witnesses, Marks and Maguire (A. 319-321, 414).[33]

10. Even though the evidence adduced at the hearing covered a broad range of both legal and evidentiary issues, the Hearing Officer refused to permit the Company to file a brief which it considered essential to bring to the Hearing Officer's attention salient evidence to explicate the delicate and essential credibility determinations, and to clarify the issues involved (Record of Hearing 988). Thereafter in making his credibility resolutions, the Hearing Officer regularly ruled against the Company on the basis of imma-

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[33] Thus Aviles and Morales' testimony that store manager Williams and after him store manager Marks stayed with them continuously to the exclusion of everything else (except to answer some telephone calls) closeted together in the sign room or in the windows for at least 4 hours each day for a period extending 4 months or more is inherently implausible (A. 462, 465, 468-70, 476, 481). Aviles' assertion that she worked as a salesgirl on Saturdays until a month before the hearing (which commenced December 6) was demonstrated untrue by her time cards which showed she did not work on Saturdays at all after September 29 (A. 725). Morales' testimony that she did not receive a raise on her promotion to the display department but only after the election was contradicted by her own paychecks as well as other documentary evidence (A. 687, 688, 689, 735).

terial or trivial discrepancies easily explainable or for no reason at all while he credited conflicting contradictory and clearly incredible testimony of Union witnesses.[34]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a decree should issue denying enforcement of the Board's order; alternatively, a decree should issue directing the Board to hold a hearing.

Respectfully submitted,

SELIGMAN & SELIGMAN
405 Lexington Avenue
New York, N. Y. 10017
Attorneys for Respondent

MADELINE BALK
On the Brief

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[34] To preclude the problem of the undue influence of the Region, the Company had requested that an independent trial examiner be assigned to hold the hearing (A. 149, 150). Instead an employee from the neighboring Brooklyn Region was assigned who was obviously loathe to exercise authority over a fellow employee on the same level (see Respondent's brief, *supra*, p. 5, fn. 4).

RESPONDENT'S APPENDIX

LETTER DATED AUGUST 16, 1974

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

August 16, 1974

Madeline Balk, Esquire
Seligman & Seligman
Chrysler Building
405 Lexington Avenue
New York, New York 10017

Re: No. 74-1762 -- N.L.R.B. v. S.H. Kress & Company (C.A. 2)
Board Case No. 2-RC-15824

Dear Ms. Balk:

Reference our telephone conversation of August 13, 1974; documents A(1) and A(2) of your Counter Designation of the Record in the above-captioned matter are not included on the certified list of the record before the Board, and hence are not included in the appendix being prepared pursuant to Rule 30 of the Federal Rules of Appellate Procedure.

As I explained it is the Boards position that matters relating to a petitioning union's showing of interest are matters of administrative concern only. Accordingly, the issue of the sufficiency of that showing is not litigable and, thus, not properly a part of the instant record.

Sincerely yours,

Edmund D. Cooke, Jr.

Edmund D. Cooke, Jr., Attorney
National Labor Relations Board

EDC/mac

RA 2

LETTER DATED APRIL 12, 1972

NATIONAL LABOR RELATIONS BOARD

REGION 2

Federal Building, Room 3614, 26 Federal Plaza

New York, New York 10007

Telephone 264-0300

April 12, 1972

Seligman & Seligman Esqs.
405 Lexington Avenue
New York, New York 10017
Att: Alan D. Eisenberg Esq.

Re: S.H. Kress & Company
Case No. 2-RC-15824

Gentlemen:

Your request in the above matter, dated April 4, 1972, that I make an administrative investigation of the sufficiency of the Petitioner's showing of interest, and that I dismiss the petition on the ground that the Petitioner's showing of interest was tainted by the activities of supervisors, has been given due consideration.

Under the Board's usual procedures if such issues are not raised at the hearing or within 5 working days after its close, no investigation will be made, unless special circumstances exist.

In the instant matter the hearing closed on March 10, 1972 and the issues your now urge were not raised until April 3, 1972, subsequent to my Decision and Direction of Election. Moreover, it is significant to note that the evidence submitted by you relating to the supervisory issue did not establish the existence of special circumstances which would justify departure from the Board's usual procedures. Rather, the investigation establishes that representatives of the Employer were aware of the substance of the allegations contained in your letter of April 4, 1972 at least as early as March 17, 1972 and possibly on March 11, 1972, but no steps were taken to bring them to the attention of the Board until your telephone call of April 3, 1972.

Accordingly, your requests are denied.

Sincerly yours,

Ivan C. McLeod
Regional Director, Region 2

RA 3

LETTER DATED APRIL 4, 1972

April 4, 1972

Hon. Ivan C. McLeod,
Regional Director
Region 2
NATIONAL LABOR RELATIONS BOARD
26 Federal Plaza - Room 3614
New York, New York 10007

RE: S. H. KRESS & COMPANY
CASE NO. 2-RC-15824

Dear Mr. McLeod:

On behalf of the Employer, S. H. Kress & Company, it is requested that you make an administrative investigation of the sufficiency of the Petitioner's showing of interest, pursuant to Section 102.63 of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended, and that you dismiss the petition in the above-entitled case on the ground that the Petitioner's showing of interest was tainted by the activities of supervisors of the Employer.

The Employer has just recently received evidence that several of its supervisors instigated, initiated and sponsored the union among its employees and directly solicited and encouraged employees to participate and directly participated themselves in the organization of the employees.

In the Regional Director's Decision and Direction of Election, dated March 27, 1972, it was held inter alia that Josie Guzman and Haydee Feliciano were supervisors within the meaning of the Act.

These two supervisors, Josie Guzman and Haydee Feliciano, instigated, initiated, encouraged and sponsored the union among the employees. These supervisor were extremely and continuously

.../...

RA 4

Letter Dated April 4, 1972

active in all aspects of union activity, including soliciting of authorization cards and arranging for, attending and participating in union meetings, introducing the employees to the union's organizers, coercing employees to sign union cards with threats of dire consequences if they refused to sign, and urging other employees to solicit for the union.

Attached are affidavits from three Company representatives: George Culbertson, Peter DeLeon and James Williams. These statements support our contention that the supervisors' participation and solicitation tainted the cards.

You will note from Mr. DeLeon's affidavit that many of the employees are reluctant, apparently because they fear reprisals from the union or its adherents, to volunteer information about the solicitation by the supervisors. Accordingly, we feel it incumbent upon your office to conduct a vigorous investigation, yet which will not reveal the sources of our information.

We are prepared to produce the affiants and also any employees that you desire.

In support of our position, we cite the following cases:

Southeastern Newspapers, Inc., 129 NLRB 311;
The Wolfe Metal Products Corporation, 119 NLRB 659.

Pending the investigation of the sufficiency of the Petitioner's showing of interest, it is requested that the time to submit the Excelsior list be extended.

Very truly yours,

SELIGMAN & SELIGMAN

Alan D. Eisenberg

ADE;tg

AFFIDAVIT OF GEORGE P. CULBERTSON

STATE OF NEW YORK

COUNTY OF NEW YORK

GEORGE P. CULBERTSON, being duly sworn, deposes and says:

1) I am employed with S. H. Kress & Co. as Vice President. Previously, between 1964 and 1968, I was Store Manager at the Kress facility located at 1915 Third Avenue, New York, New York.

2) Within the last several weeks, as part of my duties, I have talked with the employees at the Kress Store at Third Avenue. I had several conversations with Miss Feliciano.

She volunteered the following information to me: That she attended every single union meeting; that at these meetings, she spoke on behalf of the union and urged Kress employees to support the union; that she signed a union authorization card; that she talked to employees individually at the store and near the store and urged them to support the union; and that she was one of the initiators of getting a union to represent the employees. Miss Feliciano indicated to me that she thought the union would

be good for the employees for several reasons including that the union would get better treatment for the employees; that there would be equitable pay; that there would be better benefits if there was a union and that there would be job security for the employees if they were represented by a union. She also told me that she gave these reasons to the employees when she urged them to support the union.

3) One employee named Victor Diaz, who I was particularly close to and friendly with when I was the Store Manager at Third Avenue recently asked to speak with me. He said he would prefer to talk to me outside the store. We went to a nearby restaurant and had lunch. During the course of our meal, he told me that Mrs. Josie Guzman and Miss Haydee Feliciano were actively supporting the union.

I have read this statement, consisting of 2 typewritten pages and swear that it is true and correct to the best of my knowledge and belief.

Sworn to before me
this 4th day of April, 1972

Holly E. Frost

HOLLY E. FROST
Notary Public, State of New York
No. 30-1338110
Qualified in Nassau County
Certificate filed in New York County
Commission Expires March 30, 1973

George P. Culbertson,
George P. Culbertson

RA 7

AFFIDAVIT OF JAMES W. WILLIAMS

STATE OF NEW YORK

COUNTY OF NEW YORK

JAMES W. WILLIAMS, being duly sworn, deposes and says:

1) I was the Store Manager at the Kress location at Third Avenue from January to March, 1972.

2) An employee ANTONIA GARCIA recently told me that Mrs. Haydee Guzman and Miss Josie Feliciano were the main organizers at the store and that the Kress store was divided into two sections on the main floor. Miss Feliciano was in charge of getting signed cards from the employees in the rear of the main floor and that Mrs. Guzman had the same responsibility for the front half of the store. She also told me that both Mrs. Guzman and Miss Feliciano had signed cards.

3) On another occasion, an employee named Bernardo Martinez volunteered the information that a union meeting had taken place the night before and that Mrs. Guzman and Miss Feliciano were part of the group that met in front of the store and were going over to the meeting as a unit.

RA 8

Affidavit of James W. Williams

4) On another day, an employee DAWNE STEPHEN told me that Josie Guzman told her that with a union there would be more benefits and that she would have off on Good Friday because the store would be closed; that Haydee Feliciano was seen carrying around the union cards for signature; that DAWNE observed Haydee obtain a signature from Aurora Hernandez on a union card.

5) I was also told on another occasion by employee ANTONIO GARCIA that Miss Feliciano and Mrs. Guzman are the ones who approached the union to organize the store.

I have read this statement, consisting of 2 typewritten pages and swear that it is true and correct to the best of my knowledge and belief.

James W. Williams

Sworn to before me
this 4th day of April, 1972.

Holly E. Frost

HOLLY E. FROST
Notary Public, State of New York
No. 30-1338110
Qualified in Nassau County
Certificate filed in New York County
Commission Expires March 30, 1973

RA 9

AFFIDAVIT OF PETER DE LEON

STATE OF NEW YORK

COUNTY OF NEW YORK

PETER DeLEON, being duly sworn deposes and says:

1) I am employed by S. H. KRESS & CO., and am presently working in the S. H. Kress Store at 1915 Third Avenue, New York, New York.

2) I have had a number of conversations recently with Miss Haydee Feliciano and Mrs. Josie Guzman. Both have told me that they attended several union meetings in connection with the campaign to organize the Kress Store at Third Avenue; and that they spoke in behalf of the union at these meetings; that at these meetings they urged the employees to vote for the union; and stated to me that they talked to employees at the store and spoke in favor of the union.

3) Mrs. Guzman and Miss Feliciano told me that they supported the union because they thought it would be better for the employees.

4) An employee by the name of Porfirio Fernandez recently told me that Mrs. Guzman and Miss Feliciano were the leaders in the movement to bring the union into the

store. He also told me that they made the first contact with the union and requested that the union do what it could to get recognition for the employees at the Kress Store. Mr. Fernandez also told me that Mrs. Guzman and Miss Feliciano have attended every meeting and that they have participated in every stage of the organizing campaign. Indeed, Mr. Fernandez told me that Mrs. Guzman and Miss Feliciano stated to him that they would pull a strike if the union lost the election.

5) Mr. Fernandez told me that Miss Feliciano had spoken to him directly about supporting the union; had urged that he vote for the union and gave him a union authorization card to sign.

6) Mr. Fernandez was very concerned about his personal safety if the other employees in the store knew that he had voluntarily gave me this information. Finally, however, on Thursday, March 30, 1972, he agreed to give me a signed statement with the understanding that it would be treated confidentially.

7) Accordingly, I taped, with his permission, a statement as to the participation in the campaign by

Miss Feliciano and Mrs. Guzman. I then copied the statement from the tape. To demonstrate that the matter would be treated confidentially, I then destroyed the tape. The statement that was copied from the tape, which were Mr. Fernandez's exact words was then signed by Mr. Fernandez. Attached hereto as Exhibit A is the statement that he signed and attached hereto as Exhibit B is an English translation of said statement.

8) On Friday, March 31, 1972, I again talked with Mr. Fernandez. He volunteered to give me more information and details as to the participation of Mrs. Guzman and Miss Feliciano. He volunteered to give me a new statement with more details and suggested that the first statement be destroyed. I agreed and I ripped up the executed copy of Exhibit A right then and there. We then agreed to meet later on that day so that he would give me more information concerning the activities of Mrs. Guzman and Miss Feliciano. He later told me that he did not want to be seen talking to me at the store and he suggested that we meet at Kress headquarters at 114 Fifth Avenue, at Noon, Monday, April 3, 1972.

9) Mr. Fernandez did not appear as scheduled on April 3, 1972. Accordingly, I went up to the store and arrived there at 12:45 p.m. When I entered the store, I observed that he was talking to Sonia Morales, an open vigorous supporter of the union. When the conversation between Mr. Fernandez and Miss Morales ended, I approached Mr. Fernandez. He indicated that he would not talk to me.

I have read this statement, consisting of 3 typewritten pages and swear that it is true and correct to the best of my knowledge and belief.

Peter DeLeon

Sworn to before me
this 4th day of April , 1972.

Holly E. Frost

HOLLY E. FROST
Notary Public, State of New York
No. 30-1338110
Qualified in Nassau County
Certificate filed in New York County
Commission Expires March 30, 1973